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Supreme Court of the United States

No. 265 October Term, 1962

RONALD CARR,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

APPEAL FROM THE APPELLATE DIVISION OF THE NEW YORK SUPREME COURT, THIRD DEPARTMENT

MOTION TO DISMISS FOR WANT OF JURISDICTION AND SUPPORTING BRIEF

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Counsel for Appellee
The Capitol
Albany 1, New York

PAXTON BLAIR
Solicitor General

EDWARD SIEGFRIED
Principal Attorney

of Counsel

BATAVIA TIMES, LAW PRINTERS
BATAVIA, N. Y.

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BRIEF IN SUPPORT OF MOTION TO DISMISS FOR WANT OF JURISDICTION

The case involves no properly presented federal question whatsoever; and the appellee accordingly moves to dismiss the appeal purporting to have been taken to this Court by Notice of Appeal dated June 19, 1962, for want of jurisdiction in this Court to entertain it.

(1)

The appellant was the holder of two winning tickets at a racetrack in New York State but having lost or accidentally destroyed his tickets, he was unable to present them within the time fixed by N. Y. Laws 1940, ch. 254, § 12, *infra*.

Pari-mutuel betting was sanctioned in New York by an amendment to the State Constitution approved by the voters in 1939. The amendment qualified the prohibition against

gambling, and is found in Art. I, § 9. And see *Matter of Stoughton* v. *Cohen*, 281 N. Y. 343 (1939). The statutes passed upon the passage of the amendment were so phrased as to ensure the accrual of substantial revenue to the State through a tax upon the pari-mutuel revenue pool. The statute declared this purpose in plain terms. N. Y. Laws 1940, ch. 254, § 2. For the purpose of facilitating the calculation of taxes payable to the State and imposed on what was left in the pool after paying off successful bettors, the statute provided (§ 12) that funds for bettors' benefit should be retained by the tracks until April first of the ensuing year. "Within ten days thereafter, the balance of such sum remaining unclaimed and any other unclaimed amount received in the course of conducting pari-mutuel betting shall be paid to the state tax commission" (§ 12, last sentence, as amended by N. Y. L. 1957, ch. 447).*

So much for the statutory impediments to the appellant's success.

(2)

When appellant filed his claim with the Court of Claims (R., 11), he made no mention therein of any constitution—either State or Federal—as a basis for the claim. When he made a motion for judgment on admissions (New York Civil Practice Act, § 476) after the Attorney General had, by not denying, conceded the truth of allegations in appellant's Notice to Admit (R., 17-21), no mention was made of any constitution in the motion papers (Moving Affidavit, R., 15-16, and Exhibits 22-40).

* When a bettor died at the track and a winning ticket in his pocket was stolen by the undertaker's employees and recovered later, a special enabling act was necessary to enable the estate to collect. N. Y. Laws 1960, ch. 372.

The record does not contain a copy of appellant's brief in the Court of Claims but his motion was denied and the claim dismissed in an opinion set forth in the Jurisdictional Statement, pp. 18-22; reported 30 Misc. 2d 983. The opinion makes no mention of any claim under the U. S. Constitution.

Constitutional rights were belatedly asserted in appellant's brief on appeal to the Appellate Division of the New York Supreme Court, Third Department, as the Jurisdictional Statement shows at p. 6. But the appellant had so little faith in the substantiality of his constitutional point that, upon meeting defeat in a unanimous decision of the Appellate Division (Jurisdictional Statement, pp. 23-24; reported 15 A. D. 2d 709), he did not take an appeal as of right to the Court of Appeals, which is sanctioned where constitutionality of a statute is involved (N. Y. Civil Practice Act, § 588, subd. 1), but *sought leave to appeal.* Leave was denied without qualification*. Jurisdictional Statement, p. 29; reported 11 N. Y. 2d 645.

It is the custom of the Court of Appeals, when leave is sought in a case where leave to appeal is not required, to state that leave is denied because unnecessary.

In spite of his commitment by conduct to the non-existence of a constitutional question, appellant went to the Appellate Division and asked that Court to amend its remittitur to the Court of Claims to add to the remittitur a recital that a constitutional question "was presented and necessarily passed upon". This the Appellate Division refused to do. 16 A. D. 2d 858.

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*The Appellate Division had previously denied leave. 15 A. D. 2d 988.

(3)

In another case involving a lost or destroyed pari-mutuel ticket on a winning horse, *Aliano* v. *Westchester Racing Assn.*, 265 App. Div. 225, 38 N. Y. Supp. 2d 741 (2nd Dept., 1942), the Court, after citing the 1939 amendment to the New York Constitution and L. 1940, ch. 254, *supra*, said (p. 229):

> "The failure of the Legislature to provide for lost or destroyed pari-mutuel tickets was undoubtedly due to a recognition that the nature of the pari-mutuel system of betting necessarily requires a ticket to evidence the bettor's participation in the pool and that payment could not practicably be made without presentation of such ticket.
>
> Prior to the enactment of the Pari-Mutuel Revenue Law betting at horse races was illegal and the only remedy a bettor at a race track had was the recovery of his bet in a civil action. The law was not enacted for the purpose of legalizing betting at race tracks but of raising revenue for the State, '* * * it being the purpose of this act to derive from such betting as herein authorized a reasonable revenue for the support of government * * *.' (§ 2). Pari-mutuel betting on horse races was made lawful only '* * * if conducted in the manner and subject to the conditions and supervision provided by this act * * *.'" (§ 2.)

This case was cited and followed in the instant case. Jurisdictional Statement, p. 21.

The moneys in the pari-mutuel pool which are left after the payment of duly presented winning tickets are public moneys. *Matter of Roosevelt Raceways, Inc.* v. *Monaghan*, 9 N. Y. 2d 293 (1961), app. dis. 368 U. S. 12 (1961). Moreover, the statute imposing limitations upon the time within which claims premised upon the ownership of winning tickets must be presented, and construed by the Courts to make presentation of such ticket indispensable to col-

lection, was on the books and had been so construed, prior to the day the appellant attended a race and thereafter lost or destroyed his ticket. Thus it is manifest that no right of his under the Fourteenth Amendment has been violated.

CONCLUSION

The appeal should be dismissed for want of jurisdiction.

August 7, 1962.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the State
of New York
Attorney for Appellee

Paxton Blair
Solicitor General

Edward Siegfried.
Principal Attorney

of Counsel